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IN THE

Supreme Court of the United States

October Term, 1968

FREDERICK T. ZUBER, Et Al., *Petitioners,*

v.

RUSSELL ALLEN, Et Al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 861

FREDERICK T. ZUBER, Et Al., *Petitioners,*

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The Commonwealth of Massachusetts, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The

opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF AMICUS CURIAE

The instant case involves the validity of an integral provision of the 1964 Federal milk marketing order for the Massachusetts-Rhode Island area. That provision for a farm location differential price adjustment has been included in the Secretary's orders for this same general marketing area for over three decades. The Commonwealth lies at the heart of the area regulated by the 1964 order. Its citizens are those principally affected by the decisions below which have already had a severe and adverse impact. Since January 1967, when the district court ordered escrowing of the nearby differential adjustments, approximately 17 percent of Massachusetts dairy farmers have abandoned dairying operations. Of the over $5.5 million in escrow as of November 1968, farmers in the Commonwealth have the major stake—about $3.4 million. In addition, the peremptory elimination of the adjustments by the rulings below threatens, if upheld, in the view of both the Commonwealth and cognizant officials of the United States Department of Agriculture, to "bring about chaotic conditions in the market" and "so misalign the existing [milk] price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result."[1]

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[1] Affidavit of Herbert Forest, Director of the Dairy Division, U. S. Department of Agriculture, filed with the district court on January 9, 1967 and transmitted to this Court as part of the original record.

REASONS FOR GRANTING CERTIORARI

For the reasons stated in the petition itself as well as those stated below, this case is one warranting review by this Court.

1. The decision below raises an important question of Federal law affecting the largest segment of the agricultural economy of Massachusetts. For over thirty years, the dairy industry of Massachusetts has made substantial investment and management decisions predicated upon a Federal milk regulation including a farm location (also called "nearby") differential. The legality of the very differential questioned here, included in the predecessor 1937 Boston order, was fully considered in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342. Speaking for a unanimous panel sitting in the heart of the marketing area affected, Judge Magruder explicitly upheld a provision for a nearby differential adjustment identical to that involved in the instant case. Despite this unequivocal ruling, the court below, far removed in distance from the market's locale and acting over three decades later, has now seen fit to override it. The consequences of the lower court's ruling have been and will be severe.

The most important segment of Massachusetts agriculture is dairy farming which represented 31 percent of the total receipts from farming in 1967.[2] As of July 1, 1968, there were 1,564 dairy farms in Massachusetts. All but a handful are located within the nearby and

[2] Source: USDA Bulletin entitled "Farm Marketings", Economic Research Series.

intermediate zones for the Massachusetts-Rhode Island milk order and the vast majority of them market their milk under that order.

For the average Massachusetts dairy farmer, the farm location differential price adjustment constitutes virtually his entire return for his own labor. The net differential, escrowed pursuant to the district court's order commencing in January 1967, averaged $1,393.70 per Massachusetts producer in 1968. The average annual return for the farmers' own dawn-to-dusk labor has been estimated at only $1,517 in 1965, the most recent year for which statistical data is available.[3]

Deprived of the use of the monies escrowed, representing such a large portion of the nearby farmers' annual return, a substantial number of Massachusetts dairy farmers have already been forced to discontinue operations. Since the escrow commenced, 296 dairy farmers have ceased operation, a 17 percent drop in the number of farmers in Massachusetts in a two-year period.

The distant producers marketing under the order have not experienced such attrition. While the number of producers in the nearby zone has substantially decreased since the escrow commenced, the number of district producers under the order was in fact greater in October 1968 than in October 1966 (6,578 as compared to 6,413). While in 1966, both nearby and dis-

[3] Source: USDA Bulletin #230 entitled "Farm Costs and Returns" giving data for the year 1965 for the average dairy farm in the Central Northeast including New England. See affidavit of Reuben Hall, at pages 4-5, filed with the district court on January 9, 1967 and the affidavits of 18 nearby farmers marketing under the Massachusetts-Rhode Island order filed with the district court on January 16, 1967. The affidavits are part of the original record that has been transmitted to this Court.

tant zones suffered an equivalent percentage reduction in numbers over 1965, in 1967 and 1968 after the escrowing of the net differential the nearby zone lost a large number of farms but the distant zone increased their number in 1967 and experienced only a negligible drop in numbers in 1968.[4] The explanation is clear. While the nearby blend dropped 32 cents per cwt. from October 1966 to October 1967, after escrowing of the net farm location differential, the distant farmers enjoyed a 3 cent increase (without regard to any distribution of the escrow). The same relative disparity has continued since October 1967.

If the lower court's judgment becomes final, the impact will be much more severe than the loss of Massachusetts dairy farm operations alone. Dairying contributed nearly $50 million to the Commonwealth's economy in 1967, 31 percent of the total agricultural receipts of $170 million in that year. Other vital elements of the Commonwealth economy will be seriously affected as well. The reduction of dairy farming operations necessarily would reduce requirements for goods and services for the farms, diminish Massachusetts processors' operations, cut employment, reduce consumer buying power, and will thus have an adverse effect upon the entire economy of Massachusetts.

Absent review and reversal by this Court, the direct loss to Massachusetts farmers will not only be the bulk of the $3.4 million of their monies now held in escrow but also the substantial investments in new dairy farm facilities, conservatively estimated to exceed $8 million, made within the last ten years. In recent years,

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[4] Based on the Monthly Statistical Reports (including yearly summaries thereof) of the Market Administrator for the Massachusetts-Rhode Island Milk Marketing Order.

the economics of dairy farming have compelled large new capital investments. Massachusetts farmers have based their managerial decisions to incur these large capital costs predicated upon the three decades of blend prices that included the farm location differential adjustment and upon the unchallenged legal authority of the Secretary, since *Green Valley,* to include the differential in his milk orders.

The general scarcity of farm labor and its high cost, where obtainable, coupled with the volume economies of present day dairying have compelled farm automation and establishment of larger herds. In 1940, over 70 percent of the Massachusetts dairy cows were in herds of 30 or less and even as late as 1955 over 50 percent were in herds of 30 or less cows. In 1960, 60 percent of Massachusetts dairy cows were on farms that had *more* than 30 cows.[5]

The investment required to increase a herd from 30 to 50 cows is approximately $52,900 as follows: Buildings, $35,400; 20 cows, $9,000; milking equipment, $5,000; bulk tank, $4,500; total, $52,900. The new investment required to increase from 30 to 70 cows is $69,100[6] and it is estimated that the capital to increase to 100 cows or more ranges from $50,000 to $150,000 depending upon the previous size of the farm.

As is apparent from the itemization of the capital improvements, if a farmer is forced to cease dairying

[5] Source: Department Series 1 Bulletin, entitled "Large Dairy Farms in Massachusetts", Massachusetts Department of Agriculture.

[6] Source: Based on Bulletin 516, entitled "Income Changes from Reorganization of a Representative New England Dairy Farm", University of Massachusetts.

operations, this investment in building and equipment is almost a complete loss, except for the livestock and limited salvage value, since the facilities are not fully usable in other agricultural enterprises.

In the 9-year period 1955-1964, it is conservatively estimated that capital improvements were made by Massachusetts dairy farmers in excess of $8 million.[7] The decisions to enlarge their herds from the predominate 30 or less cows prior to 1955, to the 50 to 100 cow herds now common, were made by both the farmers and their banks based upon the prevailing pattern of the milk prices under orders that included the farm location differential. The decision below has seriously jeopardized this over $8 million investment in capital improvements.

In the light of the 30-year history of inclusion of the differential by the Secretary, the explicit court sanction in *Green Valley* of the Secretary's authority to include it and Congressional acquiescence in the Secretary's authority with knowledge that nearby differentials were employed and the fact that

—the nearby differential is a very substantial factor in Massachusetts dairy economy;

—its elimination has had, and will have a substantial adverse effect on the agricultural economy and upon Massachusetts' overall economy; and

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[7] Information is available for this 9-year period on farm size and expansion from which estimates of capital investment may be reliably computed. The data source is set forth in footnotes 5 and 6. The escrow of the "nearby" differential that commenced in January 1967 has discouraged capital improvements in Massachusetts dairy farms in 1967 and 1968.

—substantial investments in excess of $8 million have been made based upon the previously declared validity of the differential in the *Green Valley* case,

this Court should grant the petition for certiorari to review the decision of the Court of Appeals having such a grave importance to so many.

2. As a matter of proper administration of justice, this Court should grant certiorari on the question of whether a matter of such complexity and importance requires that the affected farmers and the Secretary of Agriculture be afforded a full hearing so that the Court can be apprised fully as to the intricacies of milk marketing, the legislative history of the Act, and the history of regulation.

The decision of the district court was made on motion for summary judgment. *No hearing* was held in order to explain to the lower court the complexities and intracacies of milk marketing, the historic antecedents and legislative history of the Act, and the over 30 years of consistent administrative action to include a farm location differential in New England milk orders. *The affected nearby farmers were denied* an opportunity to participate as parties in the district court proceedings.

Significantly, in the cases in which courts have had the benefit of a full hearing and briefing, the authority of the Secretary to include a nearby differential has been upheld. *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533; *Green Valley Creamery, Inc.* v. *United States, et al.*, 108 F.2d 342 (C.A. 1); and *Cranston, et al.* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968).

A decision of such broad scope and severe economic impact upon so many individual farmers and the economies of several states should not be rendered without affording every interested party his day in court to develop a thorough and complete record for resolution of the difficult legal and economic issues involved.

The courts below, proceeding without aid of a thorough record, have fallen into basic misunderstandings of the milk market, the statutory history and the inherent economic value of nearby milk. For example, the Court of Appeals below discounted whether nearby producers are in fact more even in their production or that evenness benefits the market by reducing the burden of surplus during the flush production period. In fact, in 1967 nearby producers as a group were twice as effective in evening out production as distant producers.[8] Nearby producers' production fluctuated only 13.8 percent during the year while distant varied 32.7 percent. Also, the court below stated "it does not appear" that a farm location differential ever appeared prior to the Boston order of 1937. The *Cranston* court on the basis of a complete evidentiary hearing concluded otherwise.

The Court of Appeals below rested its decision on the language of the Committee Reports, without aid of any elucidation on the legislative history. The *Cranston* court with the benefit of its thorough hearing rested its contrary statutory interpretation on the remarks of principal congressional advocates of the Act in the Congressional Record, the full Committee Reports and the market conditions that prevailed at the time and to which Congress addressed itself.

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[8] Source: Monthly Statistical Reports, Market Administrator, Massachusetts-Rhode Island Milk Order.

With so much at stake and given the labyrinthean complexity of the dairy industry, summary judgment is ill-suited, and the denial of a full hearing and denial of participation of all directly interested parties have incurred the risk that grave injustice may have been done or serious errors committed. The complex economic issues are properly, in the first instance, for the Secretary, but in any event, a full evidentiary hearing before the district court is the only appropriate procedure to assure that there is full judicial comprehension of the complex statutory and economic issues involved.

As Professor Moore has observed:

> "But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial." *Moore's Federal Practice*, Vol. 6 at p. 2284.

Justice Jackson, in remanding a summary judgment in a comparably complex case, *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257, said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive state-

ment of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." (Footnote omitted).

CONCLUSION

Therefore, it is respectfully urged that a writ of certiorari be granted for review of the decision below.

Respectfully submitted,

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January 1969